STATE OF MICHIGAN

IN THE SUPREME COURT

ALICE JO MORALES, as Guardian and Conservator of ANTONIO MORALES, a/k/a ANTHONY MORALES, a legally incapacitated person,

Plaintiff/Appellant, and Cross-Appellee,

v.

AUTO OWNERS INSURANCE COMPANY, a Michigan corporation,

Defendant/Appellee, and Cross-Appellant.

_____/

Supreme Court Docket No. 122601

Court of Appeals Docket No. 233826

Lower Court No. 92-2882-NF
Hon. Charles D. Corwin

122601

DEFENDANT-APPELLEE AUTO-OWNER INSURANCE COMPANY'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

By Order dated August 1, 2003, the Court granted the Plaintiff's motion to file a supplemental brief, granted the Trustee's motion to intervene, and permitted the filing of an amicus brief by Wrench LLC. During the time when these motions were under consideration, defendant-appellee/cross-appellant Auto-Owners Insurance Company responded to these various motions. This supplemental brief addresses those various pleadings in one brief for the Court's convenience.

ARGUMENT

I. PLAINTIFF'S ARGUMENT IN HIS SUPPLEMENTAL BRIEF MISREPRESENTS DEFENDANT'S POSITION WITH REGARD TO THE PRESERVATION OF THE DETRIMENTAL RELIANCE ISSUE.

The supplemental brief previously submitted by Plaintiff/Appellant, and now accepted by this Court for filing, is based on documents that are not part of the record of this appeal which the Court is now asked to consider, and repeatedly accuses Defendant/Appellee of making "blatant misrepresentations" where no such misrepresentations are made. In fact, the only way that Plaintiff can create the impression of "misrepresentations" is by mischaracterizing the arguments made by Defendant, and then seeking to discredit these invented "misrepresentations" that were never made.

Plaintiff begins his argument by stating that Defendant "blatantly misrepresented" facts to the Court because Defendant allegedly accused Plaintiff of failing to preserve the detrimental reliance argument for appellate review. (Plaintiff's Motion, p. 6, Supplemental Brief, p. 6.) Defendant made no such misrepresentation in its pleadings. Defendant argued that Plaintiff's request to the Court of Appeals that the case be remanded to the trial court to determine if there

was detrimental reliance was not raised in the trial court. Defendant also noted in a footnote that Plaintiff argued that the disposition of the funds should be decided by the bankruptcy court, not that the circuit court or bankruptcy court should decide the issue of detrimental reliance. (Defendant's Response to Plaintiff's Application for Leave to Appeal ("Response Brief"), p. 16.) Defendant never stated in its pleadings that Plaintiff had not opposed Defendant's motion in the trial court (in fact such opposition is noted at page 6 of Defendant's Response Brief), or that Plaintiff did not argue he had paid the money in reliance on the Court's order.

Defendant agrees that Plaintiff opposed Defendant's Motion for Relief from Judgment by arguing that the judgment had been partially paid and that monies were distributed to the bankruptcy court and service providers. Plaintiff did not, however, seek any type of evidentiary hearing from the Court to determine the issue of detrimental reliance. That was Defendant's only point with respect to this one paragraph in its Response Brief, and that point is fully supported by the record.

II. THE PREJUDGMENT INTEREST ISSUE WAS PROPERLY RAISED AND DISPUTED BY DEFENDANT AT THE TRIAL COURT LEVEL.

Plaintiff also argues that Defendant misrepresented to the Court whether prejudgment interest was disputed at the trial court level. In support of his argument that the prejudgment interest award was not contested at the trial court, Plaintiff attaches correspondence between Plaintiff's counsel and Defendant's prior counsel regarding the calculation of prejudgment interest on the award of benefits. (Plaintiff's Supplemental Brief, Exhibit C.) None of these documents are part of the record of this appeal, and could not properly be considered by the Court in the event leave is granted or this case is decided on a preemptory basis. Appeals are to be decided based on the record before the Court. MCR 7.311. Thus, documents outside the record should not be considered in the Application process either.

Even if the documents are considered, however, they are irrelevant. As Defendant stated in its Response Brief, the original trial court order entitled a "judgment" was entered by that court on September 27, 2000 (Dkt. #195) and included an award of prejudgment interest from the time when the Complaint was filed through September 1, 2000. Of the total amount awarded by that order, $216,519.68 was attributable to prejudgment interest. Defendant's Response Brief also stated that this amount had been paid, together with the no-fault benefits claimed to be owing. (Defendant's Response Brief, pp. 5-6.) After the payment was made, on December 29, 2000, Defendant filed a Motion for Relief from Judgment on Prejudgment Interest Entered on September 27, 2000 Pursuant to MCR 2.612(A) and (C). (Dkt. #205.) In its Motion, defendant argued that it had mistakenly paid prejudgment interest on the portion of the interest attributable to the time when the case was on appeal (approximately four years). The trial court denied the Motion, but found that Defendant timely filed the motion, a finding not appealed by Plaintiff. (Dkt# 216; Dkt. #214, p. 216.) All of these facts concerning the proceedings before the trial court are clearly set forth in Defendant's Response Brief (*see* pages 5-6, 17.) Therefore, Defendant has never attempted to "hide" or "mislead" the Court into believing that a portion of the prejudgment interest was not paid by Defendant. Defendant agrees that it paid a portion of the prejudgment interest to Plaintiff, but also notes (as Plaintiff's Supplemental Brief fails to do), that Defendant also filed a motion for relief from judgment for the award of that prejudgment interest, thereby preserving the issue for review.

Furthermore, Plaintiff's Supplemental Brief certainly attempts to lead this Court to believe that all of the prejudgment interest covered by the Court of Appeals' opinion was paid by Defendant. Such an impression would be at odds with the record. While Defendant paid the amount set forth in the September 27, 2000 order, it did not pay any of the prejudgment interest

accruing on the trial court's award of no-fault penalty interest pursuant to MCL 500.3142, an amount exceeding $260,229.62. Plaintiff's argument regarding "detrimental reliance" has no applicability to the award of prejudgment interest on no-fault penalty interest, as this amount was never paid by Defendant to Plaintiff, and therefore never paid by Plaintiff to the bankruptcy court or his creditors.

III. THE AMENDMENT TO MCL 600.6013(5) APPLIES TO THIS CASE BECAUSE NO FINAL NONAPPEALABLE JUDGMENT HAD BEEN ENTERED AS OF JULY 1, 2002.

Having already admitted that language identical to amended MCL 600.6013(5) is "arguably subject to interpretation," Plaintiff now argues that the section is inapplicable because the prejudgment interest covered by the September 27, 2000 "judgment" was paid by Defendant, and therefore the final judgment entered on March 26, 2001 became "final" and "nonappealable" prior to the effective date of MCL 600.6013(5). Plaintiff argues that the judgment was final and nonappealable because (1) it was the equivalent of a consent judgment and (2) that Defendant paid it and thereby waived its appellate rights. There are several fundamental flaws in these arguments.

First, Defendant never stipulated to the September 27, 2000 order or the March 26, 2001 judgment as a "consent judgment" as suggested by Plaintiff. Indeed, as reflected on the documents themselves (Plaintiff's Supplemental Brief, Exhibit D and Exhibit 1 hereto), Defendant approved these orders "as to form." Defendant never consented to the judgment itself or the substance of the order. It stipulated only to the form of the order, thereby preserving its right to contest the judgment.[1]

[1] Plaintiff cites two cases involving consent judgments, which it claims stand for the proposition that consent judgments are reviewed for abuse of discretion. *Hadfield v Oakland County Drain Comm'r*, 218 Mich App 351 (1996) and *Barrett v Kirtland Cmty College*, 245 Mich App 306 (2001). As is evident from the transcript attached to Plaintiff's Supplemental

Second, if Defendant had paid the judgment in full and never sought to set it aside, then it might be argued that Defendant had forever waived its right to appeal the portion of the prejudgment interest covered by the September 27, 2000 order. In the "waiver" cases cited by Plaintiff, the parties had voluntary paid a judgment and did not contest it until after the appeal was filed. *See Industrial Lease-Back Corp v Township of Romulus*, 23 Mich App 449; 178 NW2d 819 (1970)(township waived its right of appeal when it issued permits before filing a claim of appeal); *Becker v Halliday*, 218 Mich App 576; 554 NW2d 67 (1996)(plaintiff not permitted to appeal after providing a satisfaction of judgment to the defendant); *Bartel v New Haven Township*, 323 NW2d 806 (1982)(defendant who pays a judgment, receives a satisfaction and files it before appealing loses right to appeal); and *Dummings Enterprises v Shukert*, 231 Neb 370; 436 NW2d 199 (1989)(compliance with a writ of mandamus before appeal deprives part of appellate rights).

This scenario, however, does not describe this case. Here, after having paid the amount covered by the September 27, 2000 order, Defendant filed a motion with the trial court to set the judgment aside on the basis that it had paid prejudgment interest in error for the time period that the case was on appeal. (Dkt. #204 and 205). Although the trial court denied that motion, Defendant had every right to challenge the trial court's denial of that motion on appeal, and did so. On appeal, the Court of Appeals agreed with Defendant that prejudgment interest was not due and owing during the time that the case was on appeal and reversed the trial court with respect to that issue. Although Plaintiff argued to the Court of Appeals that the judgment should

Brief, this is the first time Plaintiff has argued that the September 27, 2000 judgment constituted a "consent judgment." Furthermore, given that Defendant stipulated to the September 27, 2000 order only as to form and not as to substance, it cannot be construed as a consent to the substance of the terms contained therein. If Plaintiff's position on this issue was adopted as the law of Michigan, no parties will ever again approve an order as to form only on the fear that a Court will not honor such a stipulation and will instead interpret it as a stipulation approving the form and substance of the order.

not be set aside, the Court of Appeals did not accept that argument, and neither should this Court. The bottom line, however, is that Defendant properly preserved its right to challenge the portion of the award of prejudgment interest it had already paid by filing its motion for relief from judgment, unlike the facts presented in the cases cited by Plaintiff. Thus, the issue was not waived and the March 26, 2001 judgment did not become final and nonappealable as a result of the payment on the September 27, 2000 order.

Third, and critically important, is that the order that the Court of Appeals determined to be "final" was the judgment entered on March 26, 2001.[2] Defendant has not paid the no-fault penalty interest awarded by that judgment, or the prejudgment interest awarded on top of the no-fault penalty interest (approximately $260,299.62). That judgment was subject to appeal even under Plaintiff's new theory, as it has never been paid. The amended statute states that it applies to all cases where there is a "final, nonappealable judgment" entered as of July 2, 2002. The judgment at issue in this appeal is the March 26, 2001 judgment, and it was still appealable – even with respect to the prejudgment interest – as of July 2, 2002. Thus, the new statute applies.

Finally, Plaintiff argues that by "stipulating" to the calculation of interest, Defendant lost its right to appeal. Once again, this argument was not raised to the Court of Appeals. Moreover, all of the orders regarding the calculation of interest were approved as to form only. In the unpublished decision cited by Plaintiff, *Housing Products Co v Flint Housing Comm*, docket No. 233605, decided November 15, 2002, the issue before the Court appears to have been the proper date on which the prefiling interest began to accrue. The Court of Appeals recited that the parties had stipulated to the calculations and the date on which they should begin, and had

[2] As noted by Defendant in its original Response Brief, it filed a Claim of Appeal from the September 27, 2000 order, but the Court of Appeals determined that it was not a final judgment and remanded the case back to the trial court for entry of a "final" judgment.

thereby waived their right to challenge the date when interest began to accrue. Defendant here made no such stipulation, approving the judgments only as to form, and not as to the substance of the contents of any of the orders.

IV. THE DETERMINATION OF WHETHER ANY FUNDS SHOULD BE RECOUPED FROM THE CREDITORS OF PLAINTIFF NEED NOT BE DECIDED BY THIS COURT.

The Trustee's motion to intervene, filed years after Defendant filed its Claim of Appeal challenging the trial court's findings on prejudgment interest, implies that if this Court affirms the holding of the Court of Appeals, or does not accept the Application for Leave to Appeal filed by Plaintiffs, that it will result in repayment of funds from the creditors of the bankruptcy estate to Defendant. This is not necessarily true. In the event that this Court does not grant either the Application or the Cross-Application for Leave to Appeal, the holding of the Court of Appeals will stand.[3] Under that scenario, Defendant has been ordered to pay no-fault penalty interest to Plaintiffs in an amount that exceeds the amount of prejudgment interest previously paid by Defendant to Plaintiff. In other words, Defendant will be entitled to offset the amounts it owes to Plaintiff against the amount Plaintiff owes to Defendant, resulting in an additional net recovery to the bankruptcy estate. No repayment by the creditors of the estate, or the estate itself, would be required.

In the event that the Court accepts Defendant's Cross-Application for Leave to Appeal and reverses, but allows the Court of Appeals' ruling to stand with respect to prejudgment interest, Plaintiff would owe Defendant additional funds. Because Plaintiff is apparently still under the protection of the bankruptcy court, a legal finding that Plaintiff owes funds to

[3] The same result would be occur if the Court grants both Applications and affirms in all respects, or if the Court denies the Application, grants the Cross-Application but affirms. Any resolution that concludes with the result ordered by the Court of Appeals in this case would result in a net recovery to the bankruptcy estate, not a payment by the estate to Defendant.

Defendant does not end the resolution of the issue. Instead, Defendant would presumably need to go to the bankruptcy court and seek the repayment of funds from that court, which has jurisdiction over the res of the estate. The Trustee will have ample opportunity at that stage to present his position to the bankruptcy court and argue whether the funds can be recouped from the creditors. This possible outcome should not deter this Court from ruling on the merits of the appeal. The collection of any overpayments that result from this Court's ultimate holding, if any, will be for the bankruptcy court to decide, where the Trustee can argue his position to that court that recoupment should not be permitted from creditors paid from the judgment.

V. RESPONSE TO THE ARGUMENTS RAISED BY WRENCH, LLC

Defendant submits that its original response to the Application responds to the amicus brief filed by Wrench LLC. For example, Wrench argues that MCL 600.6013 is "plain and unambiguous" at pages 6 through 8 of its amicus brief. Plaintiff Morales advanced the same argument at pages 1 through 4 of his Application. Similarly, Wrench argues at pages 9 through 12 that *Dedes v Ash*, 233 Mich App 329; 590 NW2d 605 (1998) was wrongly decided, an argument made by Morales at pages 4 through 5 of his Application. Therefore, Defendant will not burden the Court by repeating its response to those arguments here.[4]

The Wrench amicus brief does note one error in Auto-Owners' Brief Opposing the Application for Leave to Appeal at page 13 that Auto-Owners brings to the Court's attention. In citing to the case of *People v $176,598.00 United States Currency*, 242 Mich App 342; 618 NW2d 922 (2000), the cite should have stated "*reversed on other grounds*, 465 Mich 382; 633

[4] Defendant does note however, that the amicus relies heavily on the "plain language" argument. While Defendant concedes that this Court has held that the plain language of the statute controls, *see e.g.*, *People v Hawkins*, 468 Mich 488 (2003), Defendant submits that the amendatory language does not make the award of interest mandatory, and does not require the Court to impose interest during the course of an appeal.

NW2d 367 (2001)", rather than "*aff'd*, 467 Mich 382; 633 NW2d 367 (2001)". This error was apparently missed in the final cite-checking of the Brief. The argument advanced by Auto-Owners in its Brief for which the case was cited, however, remains valid.

CONCLUSION

Defendant requests that the Plaintiff's Application for Leave to Appeal be denied, and that Defendant's Cross-Application for Leave to Appeal be granted.

Respectfully submitted by,

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